No. 80-1130

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In the Supreme Court of the United States

OCTOBER TERM, 1980

PEOPLES BANK OF INDIANOLA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review an order of the district court dismissing the class aspects of the Equal Employment Opportunity Commission's complaint, after the remaining claim of an individual charging party was voluntarily dismissed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 623 F. 2d 366. The order of the district court (Pet. App. 4a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980. A petition for rehearing was denied on October 9, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on January 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission brought this employment discrimination action under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), alleging that petitioner violated the Act by refusing to hire blacks because of their race and by maintaining racially segregated job classifications (Pet. App. 1a). The action arose out of a charge filed with the Commission by Emanuel Walls alleging that he had been denied employment by the bank because of his race (*ibid.*).

Prior to trial, the district court dismissed the Commission's complaint to the extent that it sought relief for any discriminatees other than Walls on the ground that the Commission had not satisfied the requirements of a class action under Rule 23, Fed. R. Civ. P. (Pet. App. 4a). Subsequently, the court denied the Commission's motion to reconsider its denial of class certification (*id.* at 6a-7a). Thereafter, the Commission entered into a stipulation for the dismissal without prejudice of Walls' individual claims (*id.* at 8a-9a). The Commission then noted an appeal from the order dismissing the class aspects of the action (*id.* at 10a).

The court of appeals held that it had jurisdiction to hear the appeal because the Commission did not challenge the stipulated dismissal, but rather appealed only the district

court's prior order rejecting the class wide action (Pet. App. 2a). On the merits, the court of appeals reversed the district court's order on the basis of this Court's intervening decision in *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), which held that the Commission may seek class wide relief without complying with the requirements of Rule 23 (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 4-6) that the court of appeals lacked jurisdiction to hear the Commission's appeal. This contention is without merit. The court of appeals correctly applied established principles of law regarding appealable orders. Moreover, the question presented in the petition is of little or no practical significance here because the Commission can refile its action and litigate the class aspects of the suit whether or not the court of appeals' decision is reversed. Accordingly, further review here is unwarranted.

1. It is well established that dismissal for failure to meet a prerequisite to suit does not act as an adjudication on the merits and therefore does not bar a subsequent suit on the same claim after the prerequisite has been satisfied. See *Costello* v. *United States*, 365 U.S. 265, 286-288 (1961); *Truvillion* v. *King's Daughters Hospital*, 614 F. 2d 520, 524-525 (5th Cir. 1980); *Mann* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F. 2d 75, 76 (5th Cir. 1973). Therefore, the district court's dismissal of the class aspects of the case on the ground that the Commission had not satisfied the class action requirements of Rule 23, Fed. R. Civ. P., does not preclude the Commission from prosecuting the class claims in a subsequent action.[1] Because this

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[1]Because Walls' individual claims were dismissed without prejudice (Pet. App. 8a), they may also be reasserted in a subsequent suit. See, *e.g.*, 5 Moore's, *Federal Practice* para. 41.05[2] (2d ed. 1980).

Court has held in *General Telephone Co.* v. *EEOC, supra*, that the Commission is not subject to the requirements of Rule 23, the Commission is free to refile its suit and litigate the merits of the class aspects of the case. Thus, further review of the court of appeals' decision would be a largely academic exercise.

2. In any event, the decision of the court of appeals is correct and does not conflict with that of any other court of appeals. It is well settled that a dismissal without prejudice is a final determination for purposes of appeal. See, *e.g.*, *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); *Wecker* v. *National Enameling and Stamping Co.*, 204 U.S. 176, 181-182 (1907); *Elfenbein* v. *Gulf & Western Industries, Inc.*, 590 F. 2d 445, 448-449 (2d Cir. 1978). It is also clear that an order precluding maintenance of class claims is subject to appeal after final disposition of the entire case. *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 336 (1980). Therefore, the order of the district court striking the class allegations from the complaint became final and appealable by virtue of the stipulated dismissal without prejudice of the individual aspects of the case, which left no remaining issue to be litigated.

That the Commission voluntarily agreed to the dismissal of the individual aspects of the case does not preclude appeal of the prior order striking the class aspects. In an analogous situation, this Court held in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), that the United States could appeal an order for production of records, although the order became final only because, at the government's request, the complaint was dismissed for failure to comply with the production order. See also *Raceway Properties, Inc.* v. *Emprise Corp.*, 613 F. 2d 656, 657 (6th

Cir. 1980); *United States* v. *Rent-a-Homes Systems of Illinois, Inc.*, 602 F. 2d 795, 797 (7th Cir. 1979).[2] Similarly here, the Commission appealed only the adverse ruling, to which it never consented, striking its class allegations; it did not seek review of the individual claims that were dismissed by stipulation.

It is true, as petitioner asserts (Pet. 5), that the Commission could have chosen to litigate the individual claims of the charging party, postponing its appeal of the order dismissing the class allegations until after judgment on the individual claims. However, it was not required to take that course, which would have involved needless duplication and inefficient use of the time and resources of both the district court and the EEOC.[3]

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[2] *United States* v. *Babbitt*, 104 U.S. 767 (1881), on which petitioner relies (Pet. 4), has no application here. In that case, the government's consent to entry of judgment for the claimant waived any right to contest that judgment or underlying rulings of the trial court on appeal. Here, the Commission made no waiver and never consented to the order it appealed. Petitioner also cites (Pet. 4 n.2) numerous decisions by the courts of appeals that require "adverseness" as a condition precedent to review. The necessary adversity is present here, as it was in *United States* v. *Procter & Gamble Co.*, *supra*, where the Court noted that the government had at all times opposed the order of which it sought review. See 356 U.S. at 680.

[3] Contrary to petitioner's contention (Pet. 6), the decision below will not inundate the courts with appeals from interlocutory orders. The issue presented here is not likely to arise in a private action. It is unlikely that a private individual would stipulate to a dismissal of his individual claim in order to appeal a prior collateral order, such as the denial of class certification. Among other things, such action entails the serious risk that a subsequent action on the individual claim will be barred by the applicable statute of limitations, which does not bind the EEOC. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 366-372 (1977). Moreover, the Federal Rules of Civil Procedure permit a party to voluntarily dismiss its complaint without prejudice only once. See Fed. R. Civ. P. 41(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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